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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-607

ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.,
Respondents.

PETITIONER'S REPLY BRIEF

WORTH BOWLEY
JAMES F. FAIRMAN, JR.
PATRICK F. MARTIN
BOWLEY & SCOTT
1730 Rhode Island Avenue, N.W.
Washington, D. C. 20036
(202) 293-2170
Counsel for Petitioner

PRESS OF ROBERT B. ADAMS PRINTING, INC., WASHINGTON, D. C.

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To evade the substantive issue AMC inconveniently insists upon pressing here, SEC and its handmaiden Bay State make an essentially procedural response. Under the Public Utility Holding Company Act of 1935, SEC has the responsibility to achieve a divestiture which complies with the public interest standards of the Act. Accordingly, SEC should be in a position, were it doing its job, to show in a detailed, evidentiary fashion that the NEES divestiture of Lawrence Gas

Company meets the statutory standards—i.e., that it is not, as AMC contends, a mere ritualistic transfer of utility property from NEES frying pan into the Tenney Group fire.

But SEC has made no such showing. On the contrary, its citation of the enforcement action against the Tenney Group taken by FPC under its limited statutory powers tends to confirm AMC's position that the Tenney Group is at least prima facie an impermissible purchaser of the Lawrence Gas Company (S.G. Br., pp. 13-14). While FPC has jurisdiction to prevent interlocking relationships, SEC is charged with the basic responsibility for regulating the substance of corporate relationships as they impinge on consumer interests.

The principal substantive contention made by SEC and Bay State to remove this transaction from the scope of Sections 9(a)(2) and 10 is not that such a transfer can be permitted absent specific SEC authorization, but that it was only a step in a series of transactions (S.G. Br., pp. 11, 12), was motivated by tax avoidance considerations (Bay State Br., pp. 11, 12), and thus should be ignored.* Never has the tax avoidance tail wagged a more impressive dog. Now the normal application of statutory law has joined the list of sound criteria to be superseded by the Great American Principle of Tax Law, that tax revenues must, at all costs, be held to a minimum. Aside from its in-

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* Bay State argues (B.S. Br., p. 11) that the transactions are subject to Sections 9(a)(2) and 10 only "for a *scintilla juris.*" This phrase, borrowed from late medieval conveyancing theory, is not defined, but appears from its context to mean a time period of unspecified length during which laws are superseded and anything goes.

validity, this argument does such extreme violence to SEC's jurisdictional reach by eliminating from it matters which Congress placed within it, that future SEC commissioners and Solicitors General will be greatful if this Court declines to accept it.

The procedural arguments advanced by SEC and Bay State, even given their maximum possible weight, should not countervail AMC's principal point, that SEC has the responsibility to accomplish divestiture relief in this case which is unequivocably in the public interest. Two decisions of this Court attest that the 1964 SEC order calling for the NEES divestiture of its gas distribution properties is in the public interest. The adverse effects on consumer interests flowing from Bay State's acquisition of one of these properties, and the failure of SEC to inquire into them, are central to AMC's complaint. They are not gainsaid by the procedural arguments advanced by SEC and Bay State.

Moreover, the procedural arguments themselves are infirm. The first of them is that AMC's original petition was too generally drawn and merely incorporated by reference criticisms it had already leveled against the NEES divestiture of other subsidiaries' stock to Eastern Gas and Fuel Associates (S.G. Br., pp. 10-11). In its original decision authorizing the sale of Lawrence Gas Company stock to the Tenney Group, SEC made no such particularized contention. Indeed, in the Lawrence case SEC ignored AMC's interest and did not even serve AMC with a copy of its decision. AMC, which was not obliged to petition for rehearing in order to secure court review of this obviously defective decision, did so in an effort to persuade SEC to fulfill its statutory responsibilities. Only then did SEC raise this specious point—specious because SEC knew all along

that AMC's criticisms of the proposed NEES divestiture were directed both to the procedures for accomplishing it and to the impermissible purchaser these procedures had led to.

The second procedural argument is that AMC somehow failed to exhaust its administrative remedies in the SEC proceeding because it did not participate in State proceedings conducted by the Massachusetts Department of Public Utilities pursuant to Massachusetts law, where some common issues were considered. (Bay State Br., p. 13). If AMC had been a party to the Massachusetts proceedings (it had not) and if the Massachusetts Department of Public Utilities had been exercising some function under the Public Utility Holding Company Act of 1935 (it was not), this argument might possibly be germane. Under existing circumstances, it is inapplicable.

The third procedural argument SEC and Bay State advance is that AMC has already had its hearing. They cite the Eastern proceeding, an inapposite matter which they themselves contend involved different properties, a different purchaser, and different issues (Bay State Br., pp. 3, 13-14; S.G. Br., pp. 6-7, 11), and which reached a far different result. True, a hearing was ordered in that proceeding and AMC did participate in it; but the hearing was terminated midstream, concluded because Eastern Gas & Fuel Associates, the acquiror of the stock of the divested properties, chose to make settlement with AMC and other intervenors which substantially met at least minimum public interest standards. This settlement provided an option to the communities served by the gas properties in question whereby they might acquire them for municipal operation. In addition it required Eastern Gas & Fuel Associates,

an exempt holding company, to seek SEC approval of future acquisitions of utility properties under the standards of Sections 9(a)(2) and 10 of the Act. Unfornately, no such accommodation of local consumer interests was made in the Lawrence Gas Company case. Had it been, AMC would not be here petitioning for a writ of certiorari.

Respectfully submitted,

ASSOCIATION OF MASSACHUSETTS CONSUMERS

By: ROWLEY & SCOTT
WORTH ROWLEY
JAMES F. FAIRMAN, JR.
PATRICK F. MARTIN